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before a joint hearing of the

Committee on Energy and Natural Resources and the
Select Committee on Indian Affairs
United States Senate

on S. 2018, the "T'uf Shur Bien Preservation Trust Area Act"

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I appreciate the invitation to testify here today. I am appearing today solely as a private citizen, expressing my own views. I am not representing anyone else in this matter, and am not speaking for my current employer, the University of California Hastings College of the Law, where I am currently a Distinguished Visiting Professor.

I strongly urge the Congress to enact legislation to ratify the April 2000 Settlement Agreement reached by the Pueblo of Sandia, the federal agencies, and the Sandia Peak Tram Company. The Agreement is a fair, carefully crafted resolution to the long-festering question of the location of the eastern boundary of the Pueblo of Sandia. S. 2018 substantially tracks its provisions.

I first want to comment on the views of my fellow panelist, Dr. Stanley Hordes. As was the case with many of the Spanish land grants in New Mexico, the historical record here is not a paragon of clarity. People can and have argued about many things in that record. In preparing my January 2001 legal opinion, I carefully examined Dr. Hordes' report, along with the views of other historians. My Opinion concludes that the historical record, and the collective judgment of historians who have examined the issues involved, strongly supports the Pueblo's position, rather than Dr. Hordes' position, as to the location of the eastern boundary. I continue to believe that is a correct conclusion, and a fair reading of the voluminous record. I further believe that this conclusion will be upheld by the courts if they have occasion to review it.

As that Opinion indicates, Dr. Hordes makes various assumptions and draws various inferences from the record. (Among these are the meaning of the reference to "sierra madre" in the Act of Possession, the degree to which the formal pueblo idea was followed by the Spanish in making land grants, and the relevance of the fact that the eastern boundary of nearby grants was determined to be at the mountain crest.) The Opinion points out that, in many cases, Dr. Hordes' assumptions and inferences are not shared by others who have examined such matters. Indeed, others who have examined the matter believe the record supports a conclusion opposite of that reached by Dr. Hordes. Furthermore, some of the matters Dr. Hordes addresses - such as the disputes about the northern and

southern boundaries -- are at most only remotely relevant to the location of the eastern boundary.

Dr. Hordes' conclusions are essentially the same as those in the 1988 so-called Tarr Opinion. When I was Solicitor of the Department of the Interior, the United States defended the Tarr Opinion in court, with my concurrence, even though I harbored serious doubts that it was a correct reading of the law. A very well-respected federal judge (who had been on the bench for more than two decades, and is now deceased) reviewed all the evidence and arguments, including arguments along the lines of those offered by Dr. Hordes, and ruled in July 1998 that the Tarr Opinion was defective. The judge explained that the Opinion failed to give sufficient weight to the Pueblo's arguments, and specifically had not applied a controlling interpretive principle (one which dates back in American law nearly two hundred years) for construing ambiguities in documents relating to Indians. Let me quote the key point of the judge's ruling:

> [T]he circumstances surrounding the Pueblo land grant are ambiguous. Experts . . . hold vastly differing opinions as to the proper interpretation of the Spanish land grant. The Tarr Opinion . . . myopically fails to find ambiguity. The Court finds that this error led to another error, the failure to apply the [and here the court quoted a modern U.S. Supreme Court decision] "eminently sound and vital canon . . . that statutes passed for the benefit of . . . Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Therefore, the decision of the Department of the Interior cannot stand.

The judge vacated the Tarr Opinion and sent the matter back to the Interior Department with a directive to take action consistent with the judge's ruling.

After the district court vacated the Opinion in 1998, we decided to see if the matter could be settled by negotiations in a way that satisfied the major concerns of all parties. Anyone who spends much time in litigation knows that settlements are often, even usually, preferable to litigation to the bitter end. In this particular case, settlement looked like an eminently attractive alternative. Why? For essentially two reasons.

First, all our study and conversations with the various interests convinced me and the other federal parties -- which included the Forest Service and other officials in the Department of Agriculture and the Department of Justice – that the disputants were actually in very substantial agreement about how the land in the dispute area ought to be managed. Everyone basically wanted the land to remain no more developed than it is now, to be kept in an essentially natural state, and to be open to public recreational access under reasonable supervision.

This general agreement about what ought to happen on the ground was very different from most other litigation in which I've been involved. As this Committee is well aware, typically a wide gulf divides the parties in these kinds of matters. One side wants to mine or log or otherwise develop or intensively use the land, and the other side wants it left alone. Here, by contrast, everyone agreed the

land should be left undeveloped. Moreover, the other land use objectives of the key interests were so strikingly similar that the makings of an agreement were practically staring us in the face.

There was a second and equally important reason why settlement looked attractive. Continued litigation over the Pueblo's eastern boundary simple could not resolve many of outstanding issues involving the inholders (the private landowners in the area) as well as the Tram Company, the Counties, the Forest Service, and the holders of special use permits for communications sites at the top of the Mountain, some of which are in the claim area.

Even if the Pueblo ultimately lost in court, for example, some very important on-the-ground management questions would remain. For example, what would happen to the inholders' road and utility access to their inholdings, if the Pueblo wanted to restrict access across Pueblo land (outside the claimed area)? Some of the current access is merely subject to a lease granted by the Pueblo which will expire in a few years. One of the main access roads that crosses Pueblo land outside the disputed area is actually in trespass because it is not supported by an existing lease.

Or if the Pueblo ultimately succeeded in the courts, would it choose to continue to allow access to inholders, recreationists, special use permit holders, and others? What would be the scope of its regulatory authority and jurisdiction over the area?

A negotiated settlement could address these important matters. Continued litigation over the boundary could not. The logic favoring settlement let, after strenuous, conscientious efforts, to the Settlement Agreement that brings us here today.

In my judgment, although one can always quibble over details, the settlement is a win-win. It protects all parties' key interests. It reflects agreement on all important issues of on-the-ground management, including those that could not be resolved by continued litigation. It sets out a clear path for future management of this area. It honors and respects existing uses, and it quiets title.

There is, of course, an important catch. The Settlement Agreement remains in effect only until November 15, 2002. This brings me to my second main point: There is an urgent need for prompt congressional action. If Congress does not act by then, several different things could happen. None is nearly as good as ratifying the Settlement Agreement. Each would, in various degrees, prolong uncertainty, delay ultimate resolution, lead to additional expense and, in the worst case, drive apart the various interests who have come together to produce this landmark accord.

If Congress does not act by November 15, the Secretary of the Interior may simply proceed to implement the legal opinion I signed as Solicitor in January 2001, and to conduct a resurvey of the Pueblo of Sandia's eastern boundary. Upon secretarial approval of the resurvey at the crest of the Sandia mountain, the land in the claimed area would become vested in trust for the Pueblo. If that happened, none of the various safeguards for the interests of the Tram Company, the inholders, special

use permit holders, recreational users of the lands, and the Forest Service that are included in S. 2018 would apply. It would take an Act of Congress to install such safeguards, and even if Congress passed such legislation, the Pueblo would likely have to be compensated for the resulting restrictions on its property rights.

Alternatively, the Secretary could ask the Solicitor to revisit my legal opinion. If my successor did so, and resurrected something along the lines of the Tarr Opinion, the federal courts would almost certainly be asked once again to intervene. Because the court has already rejected the reasoning of the Tarr Opinion, the United States would have a steep uphill battle in trying to convince the courts otherwise. Litigation is expensive, time-consuming, and divisive. Moreover, the only answer it can give in this kind of case is a simplistic, yes-or-no, zero-sum answer. That is, the courts simply cannot address many of the access and management questions that the agreement and S. 2018 address sensibly and in great detail.

If Congress does not act by November 15, the Settlement Agreement's guarantee of continued, permanent access to inholders, special use permit holders, the Forest Service, and recreational users across Pueblo lands would disappear. It is a risky to assume that the Pueblo will be willing to continue to support such a guarantee if the current settlement falls apart.

Finally, I have heard it said that the approach of this legislation is unprecedented, and troublesome because it gives the Pueblo a veto over new proposed uses in the claim area, and also recognizes the Pueblo's right of access for traditional and cultural uses. <u>It is my firm opinion, based on decades of practicing and teaching federal land law and Indian law, that this concern about precedent is totally unfounded.</u>

For one thing, the area will remain designated wilderness under the terms of the settlement. This, and the rugged terrain, make it very unlikely significant new uses would ever be proposed in this area. (Experience in the nearly quarter of a century since the wilderness was designated bears this out.)

For another, Congress has often devised innovative arrangements for managing federal lands which depart from convention when peculiar local conditions require it. A prominent recent example was the approach fashioned by New Mexico's congressional delegation in the Baca Ranch acquisition and management legislation, enacted into law less than two years ago.

Most important, there are many examples in the long history of arrangements between the United States and Indian tribes where Congress has acknowledged Indian rights and interests in how particular areas of federal land are managed. A number of treaties and statutes recognize rights of particular Indian tribes – most notably in the Pacific Northwest and in the Great Lakes region – to hunt, fish and gather resources on federal lands (and in some cases, nonfederal lands). At least one prominent unit of the national park system, Canyon de Chelly National Monument in northeastern

Arizona, is actually on Navajo tribal trust land, and the National Park Service administers the area under an operating agreement with the Navajo Nation.

A couple of other modern examples from the southwest are especially apt. In 1975 Congress accorded the Havasupai Indians certain statutory rights with respect to certain lands in the Grand Canyon National Park. Less than two years ago, Congress enacted a statute recognizing rights of the Timbisha Indians in certain lands in Death Valley National Park.

In short, there is ample precedent for acknowledging the right of the Pueblo of Sandia to have a say, recognized in federal law, regarding how this area will be managed. Almost everyone agrees that the Pueblo has close and ancient ties to this area. Moreover, the Pueblo has a very credible legal claim to this area. This means that the alternative to ratifying this settlement may not be that the Pueblo has no voice in how this land is managed; instead, it may be that the Pueblo has essentially the only voice in how this land is to be managed.

The Settlement Agreement that S. 2018 substantially tracks was carefully drawn during extended negotiations. Like all settlements, it reflects compromises on all sides, but I firmly believe it resolves the Pueblo's claims, and many other issues that further litigation would not resolve, in a way that is fair, comprehensive, and permanent.

Congress now has before it a golden opportunity to resolve this long-festering set of issues in a wholly satisfactory way. It would be a terrible shame if this opportunity were lost.